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Supreme Court, U.S.
FILED
FEB 21 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1212

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

MARK ROBERT HOFFMAN,
Petitioner,

v.

PEOPLE OF THE CITY OF TROY, MICHIGAN,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

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CASILLAS PRESS INC. — 1717 K ST NW WASHINGTON DC 20036 — 223-1220

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether conviction of a person who recklessly pursued a police car involved in a high speed chase to apprehend a felony suspect around a police blockade to the scene of the arrest where police officers have guns drawn and who jumps from his car, runs between the suspect and police officers with guns drawn in order to take photographs and who refuses police officer commands to leave the scene conflicts with this Court's decision in *City of Houston Texas v. Hill*, 482 U.S. 451 (1987)?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

COUNTERSTATEMENT OF THE CASE

Respondent, City of Troy, believes that Petitioner's statement of the case needs correction and supplementation. Petitioner's arrest and conviction did not arise out of an incident in which the Petitioner simply had taken pictures at the scene of an arrest after following police pursuing a fleeing suspect. This is not a First Amendment case. This is not a "verbal interruption" case nor can the ordinance at issue be legitimately construed as prohibiting verbal interruption. The ordinance

at issue simply does not conflict with this Court's decision in *City of Houston, Texas v. Hill*, 482 U.S. 451, 107 S.Ct. 2502, 96 L.Ed.2d 298 (1987).

After hearing on his police radio in his car that there was a high speed chase in progress on Interstate 75 during rush hour traffic involving a state trooper chasing a felony suspect, Petitioner pulled off the expressway onto the shoulder to wait for the chase to pass him. After the cars passed him, Petitioner joined the chase following right behind the state trooper's patrol car. Petitioner drove at speeds up to 80 mph and used all three lanes of the expressway, nearly having several accidents, in order to stay right behind the state trooper's patrol car. In order to stay in the chase, Petitioner drove his car onto the shoulder and the grassy median to get around a vehicle parked on the shoulder of the expressway. A Troy police car was parked to block the progress of the chase, but the felony suspect drove around the car pursued by the state trooper. Petitioner drove on the grassy median and the shoulder to evade the blockade and continued the chase. All traffic on Interstate 75 had been stopped by Troy police. Traffic that was stopped filled all three lanes of the expressway. Troy police had the shoulders blocked with their patrol cars. The felony suspect finally came to a stop at a roadblock, but he did not get out of his car. The Petitioner was immediately behind the state trooper's car throughout this chase. After the suspect came to a stop, the state trooper stopped and jumped out of his car, drew his gun and pointed it toward the suspect. Troy police at the scene also had guns drawn and pointed at the suspect. Petitioner who had stopped and jumped out of his car, ran up to the suspect's car directly in front of the state trooper's line of fire. Petitioner was as close as one and a half feet from the suspect. Troy police began yelling at Petitioner to get out of the way, but Petitioner refused. Petitioner was not only in the direct line of fire of the police, he

also blocked a Troy police officer's view of the suspect. Petitioner refused police officer commands to leave the scene in order to snap photographs. Although Petitioner disputes some of these facts, the jury clearly did not believe him and convicted him of reckless driving and obstructing a police officer in the discharge of his duties.

The Petition also omits that the Petitioner was charged by Respondent with "knowingly and wilfully" violating the ordinance. The trial court also gave a limiting construction of the ordinance by instructing the jury that they had to find that the Petitioner must have intended to obstruct the police officer in the discharge of his duties.

The City of Troy acted within constitutional bounds in prohibiting the obstruction and hindrance of the police officers in the performance of their duties in this case.

Most municipalities as well as state governments have ordinances or laws similar in substance to Troy's ordinance at issue. If the Troy ordinance is found unconstitutional, these ordinances will be subjected to legal challenge. This would impair the ability of local governments to adequately provide for the safety of public and law enforcement personnel. For instance, a reporter from a local radio station who was in a helicopter over the chase in this case, saw the chase come to a stop and saw Petitioner run right into the middle of the police while police were attempting to apprehend the suspect, and testified that if somebody had been shooting down there, the Petitioner would have been shot. App. p. 1a.

The Troy ordinance does not deter or prevent conduct protected under the First Amendment. Expression of free ideas is not chilled by the ordinance. The ordinance simply prohibits criminal conduct such as that engaged in by Petitioner which threatens the safety of police officers and civilians. The con-

tention that the ordinance is overbroad is completely without merit. Even assuming that the ordinance is overbroad, a reasonable limiting construction was applied in this case which obviates the need to invalidate the ordinance for overbreadth.

REASONS FOR DENYING THE WRIT

THE CONVICTION OF A PERSON FOR RECKLESSLY PURSUING A POLICE CAR INVOLVED IN A HIGH SPEED CHASE TO APPREHEND A FELONY SUSPECT AROUND A POLICE BLOCKADE TO THE SCENE OF THE ARREST AND WHO THEN JUMPS FROM HIS CAR AND RUNS BETWEEN THE SUSPECT AND POLICE OFFICERS WITH DRAWN GUNS IN ORDER TO SNAP PHOTOGRAPHS AND WHO REFUSES POLICE OFFICER COMMANDS TO LEAVE THE SCENE DOES NOT PRESENT AN ISSUE OF IMPERATIVE PUBLIC IMPORTANCE AND DOES NOT CONFLICT WITH ANY PRIOR DECISION OF THE UNITED STATES SUPREME COURT.

It is a fundamental responsibility of municipal and state governments to protect citizens from the actions of law breakers which endager public safety. One method of advancing this responsibility is through enactment of laws that make it a crime to obstruct police officers who are attempting to apprehend criminals. The purposes of these laws are to not only maintain and protect the safety of the general public and the police officers, but also protect the safety of the person committing the obstruction. For instance, in this case the Petitioner could well have been shot and seriously injured or killed as a result of his interference at the scene of the arrest. The Troy ordinance is tailored to prohibit conduct which obstructs police officers and not speech or "verbal interruptions." The Troy ordinance is comparable to the disorderly conduct statute upheld against a facial challenge in *Colten v. Kentucky*,

407 U.S. 104 (1972). In *Colten*, this Court recognized the strong governmental interest in law enforcement and affirmed a conviction under a disorderly conduct ordinance and dismissed the First Amendment violation claims. This Court held that "the state has a legitimate interest in enforcing its traffic laws and its officers were entitled to enforce them free from possible interference or interruption from bystanders, even those claiming a third party interest in the transaction." *Id.* at 109.

Conduct which obstructs police officers in the performance of their duties unquestionably poses a threat to not only public safety, and the safety of the officers, but also to the safety of the person perpetrating the obstruction. Although, this is not a First Amendment case where speech is being prohibited or limited, speech may be regulated if the regulation is within the constitutional power of the government, if it furthers a significant governmental interest, if it is not based on content of speech, and if it leaves open alternative forms for communication. *Clark v. Community for Creative Nonviolence*, 468 U.S. 288, 297-99 (1984).

As applied to Petitioner's conduct, the Troy ordinance is clearly constitutionally permissible. First, a municipal police power is broad enough to encompass an ordinance prohibiting the obstruction of a police officer during the lawful discharge of the officer's duties. *Berman v. Parker*, 348 U.S. 26, 32-33 (1954); *Noble State Bank v. Haskel*, 219 U.S. 104, 111 (1911). Second, the Troy ordinance does not forbid or suppress a particular message. It is content neutral, and regulates conduct that obstructs police officers in the discharge of their duties. Petitioner's conduct in this case is not "speech." Nor can it be legitimately interpreted that the ordinance is aimed at "speech" or "verbal interruptions" which was repugnant to this Court in *City of Houston, Texas v. Hill, supra*. Petitioner

was going to get his photographs regardless of the consequences. Petitioner's conduct was intended to unlawfully obstruct police officers in making an arrest. Petitioner was charged with knowingly and wilfully obstructing the police officers. The jury was instructed and found that Petitioner must have intended to obstruct in order to be found guilty. Petitioner's criminal conduct cannot be construed as speech. Even if his conduct could reasonably be construed to be speech, it would be conduct escalating into potential violence, therefore, even if it has a verbal element, that "does not bring with it constitutional protection." *Cox v. Louisiana*, 379 U.S. 559, 564 (1965).

Troy's ordinance has been narrowly drawn to advance the important governmental interest in law enforcement. The ordinance prohibits obstruction of police officers attempting to make arrests where such obstruction creates unwarranted danger. The ordinance does not prevent Petitioner or anyone else from expressing their opposition to the actions of the Troy Police Department. The ordinance is not aimed at nor can it be legitimately construed as aiming at constitutionally protected speech.

A. The Troy Ordinance Is Not Unconstitutionally Overbroad.

The due process clause of the Fourteenth Amendment to the Constitution of the United States requires that a municipal ordinance must be definite and certain in its statement of prohibited conduct to enable a person of ordinary intelligence who reads the ordinance to understand what activity is prohibited and govern his actions accordingly. *Grayned v. Rockford*, 408 U.S. 104, 107 (1972); *Papachristou v. Jacksonville*, 405 U.S. 156, 161 (1972).

Before the Petitioner may attack the validity of the Troy ordinance, he must establish that he has standing. Standing exists where the law as applied to the Petitioner is unconstitutional. Standing does not exist where the grounds for challenge are that the law as applied to others or in other situations may be unconstitutional. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474 (1982); *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

There is a limited rule that provides an exception to the general rule of standing where a law is challenged on the grounds that it is unconstitutionally overbroad. Persons may challenge a statute as overbroad "not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). See also *Secretary of State v. Maryland v. Joseph H. Munson, Co.*, 467 U.S. 947 (1984); *Dombrowski v. Pfister*, 380 U.S. 479, 486-87 (1965). However, this case is not a speech or "verbal interruption" case such as this Court was confronted with in *Houston v. Hill, supra*. Petitioner's conduct was not speech or verbal exprression. The ordinance does not prohibit verbal expression or verbal interruption. Petitioner has not alleged nor is there any evidence that Troy has ever applied the ordinance at issue to cases of verbal interruption or verbal expression. This is directly contrary to the facts in *Hill*. 96 L.Ed.2d at 409.

Even if Petitioner was properly before this Court, his attack on the Troy ordinance as being overbroad must fail. This Court has been historically and properly concerned with the limited exception to the general standing requirement because of the potentially unnecessary federal court interference with local and state laws. As a result, this Court has significantly

diminished the effect and application of the overbreadth doctrine as a means of constitutionally invalidating statutes. A statute or ordinance may not be invalidated as unconstitutionally overbroad unless its chilling effect on protected expression "is not only . . . real, but *substantial* as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615 (emphasis added); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (19075). Therefore, an overbreadth facial challenge fails unless the challenged law prohibits a substantial amount of constitutionally protected conduct. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 US. 489, 494 (1982). It is almost always possible to conceive or imagine situations in which some innocent activity may fall within the reach of any ordinance. Petitioner claims that such imagined situations in this case make the Troy ordinance overbroad. However, this Court has never held that a law is substantially overbroad simply because it is possible to fashion speculative situations where the ordinance could have an unconstitutional application. In fact, this Court has held directly to the contrary:

> It is clear, however, that the mere fact that one can conceive of some impermissible application of a statute is not sufficient to render it susceptible to an overbreadth challenge . . . In short, there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protection of parties not before the Court for it to be facially challenged on overbreadth grounds. *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800-01 (1984).

The Troy ordinance does not chill or limit in any substantial way freedom of expression nor can it fairly be interpreted to do so. The goal and effect of the ordinance is to protect public safety, the safety of police officers, and the safety of the per-

son obstructing the police in the performance of their duties by prohibiting *conduct* which constitutes obstruction such as that exhibited by Petitioner in this case. The ordinance is directed at intentional criminal conduct and "reflects legitimate state interest in maintaining comprehensive controls over harmful, constitutionally unprotected conduct." *Broadrick*, 413 U.S. at 615. Certainly, Petitioner cannot seriously suggest that taking photographs in the direct line of police fire is constitutionally protected conduct. Rather, it is apparent that Petitioner is trying to bootstrap himself to *Hill* by alleging that hypothetical First Amendment rights were violated in this case. Such conduct by Petitioner, which threatens the physical danger of police officers, the public and the Petitioner himself, does not rise to the level of conduct protected by the First Amendment under any conceivable rationale.

This Court has recognized that, "even if there are marginal applications in which a statute would infringe on First Amendment values, facial invalidation is inappropriate if the 'remainder of the statute. . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct.' " *Parker v. Levy*, 417 U.S. 733, 760 (1974), quoted in *New York v. Ferber*, 458 U.S. 747, 771 note 25 (1982). The overbreadth doctrine should be applied "sparingly" and "as a last resort" because it is "manifestly strong medicine." *Broadrick*, 413 U.S. at 613. There is no basis in fact to construe that Troy's ordinance be applied to cases involving verbal expression or verbal interruption. Even if the ordinance could be construed as applying in certain hypothetical expression situations, permissible applications of the ordinance would represent only a small fraction of the conduct within the ordinance's reach. Thus, such contrived or imagined overbreadth could not be considered substantial.

The requirement that the overbreadth be substantial is be-

cause few criminal laws would survive judicial scrutiny if they could be invalidated because of the remote possibility that they might, as applied to a contrived or imagined set of facts, prohibit innocent activity. In the present case, Troy's ordinance reaches a broad range of constitutionally proscribable conduct such as exhibited by the Petitioner in this case. Due process does not require impossible standards. All that is necessary is that the language convey a sufficiently definite warning as to the proscribed conduct when measured by common knowledge and practice. As this Court has stated:

> Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect — at best a prediction — cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe. *Broadrick*, 413 U.S. at 615.

Particularly appropriate is this Court's observation in *Smith v. Goguen*, 415 U.S. 566, 581 (1974):

> There are areas of human conduct where, by the nature of problems presented, the legislature simply cannot establish standards with great precision. Control of the broad range of disorderly conduct that may inhibit a policeman in the performance of his official duties may be one such area requiring as it does an on-the-spot assessment of the need to keep order.

The City of Troy, in the valid exercise of its municipal police powers, has attempted to prohibit the conduct of the Petitioner and others that obstruct police officers in the clear discharge and performance of their duties. Petitioner's conduct in recklessly pursuing a police chase and running into the

direct line of fire of police officers attempting to arrest a fleeing felon is not constitutionally protected. The fact that the Petitioner may contrive or imagine applications of the Troy ordinance that may reach protected conduct is insignificant in light of the vast amount of constitutionally unprotected conduct within the legitimate reach of the ordinance. Petitioner's claim that the ordinance is substantially overbroad must fail.

B. Even Assuming That The Troy Ordinance Is Overbroad, This Court Should Not Invalidate An Ordinance On The Basis of Overbreadth When A Reasonable Limiting Construction Was Used Or Is Available.

The overbreadth doctrine may not be used to invalidate the whole ordinance if "a limiting construction has been or could be placed on the challenged statute." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). In this case a limiting construction on the ordinance was applied by the City of Troy in charging that Petitioner knowingly and wilfully violated the ordinance at issue, and by the trial court judge who instructed the jury that Petitioner had to intend to violate the ordinance in order to be found guilty. See also *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 60 (1976).

This Court refused to limit construction of the Houston ordinance to physical acts because of pre-emption by state law. *Houston v. Hill*, 96 L.Ed.2d at 416. No such pre-emption exists in this case, and if this Court believes the limiting construction that was applied to be deficient, the ordinance can be construed to apply only to physical acts. There is no evidence that the City of Troy has applied the ordinance to verbal expression.

Finally, the petition fails to bring to this Court's attention

that this Court denied certiorari involving a nearly identical Ohio ordinance. In *Cincinnati v. Hoffman*, 31 Oh. St. 2d 163; 285 N.E. 2d 714 (1972), *cert. den.* 410 U.S. 920, 93 S.Ct. 1370, 35 L.Ed.2d 583 (1973), the defendant was charged with violating an ordinance that provided:

> No person shall resist, hinder, obstruct or abuse any police officer while such officer is engaged in the lawful performance of his duties. 285 N.E. 2d at 719.

The defendant claimed that the ordinance was vague and in conflict with Ohio law because the Ohio state statute read, "No person shall knowingly and wilfully . . ." whereas the ordinance did not specifically state "knowingly and wilfully." *Id.* at 719.

The Ohio Supreme Court held that the ordinance as reasonably construed neither prohibited any lawful exercise of any constitutional right nor escaped the understanding of any person of common intelligence. The Ohio court determined that the city ordinance was not unconstitutionally vague. *Id.* at 719. The *Hoffman* court also determined that the ordinance did not conflict with state law. The court found:

> ". . . In the instant case, however, 901-2 did not stand solely on its own terms. At the close of the trial of this cause, both in a special charge and in the general charge, the jury was explicitly admonished by the trial judge to inject the revised code scienter standards into their deliberations on the question of liability under the Cincinnati ordinance." . . . *Id.* at 719.

Even assuming that this Court agrees that Troy's ordinance impinges on constitutionally protected activity, a suitable limiting construction was applied. If there was a constitutional defect in the ordinance, that defect was cured by the limiting

construction placed on the ordinance by the City of Troy and by the trial court judge.

Verbal expression or verbal interruptions and legitimate protests of police actions are not proscribed by the Troy ordinance. Limiting constructions that were applied or could be applied such as limiting application to physical acts would alleviate any imagined concerns that the ordinance is reaching constitutionally protected activity. Therefore, this Court need not apply the "manifestly strong medicine" of determining that Troy's ordinance is fatally overbroad.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court deny certiorari and uphold Respondent's ordinance as a constitutionally valid criminal conduct regulation which serves important local government interests.

Respectfully submitted,

CITY OF TROY
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February 21, 1989

APPENDIX

Q Um-hum.

A — and numerous police officers around, guns drawn. Of course, in a case like that, they don't know if a guy's going to come out shooting, or not.

Q Did you see anyone else involved in —

A I saw a photographer come running up. A photographer was right in the middle of the police, while they were trying to subdue the person that they had taken out of the car.

Q He was right in the middle?

A He was right — If somebody had been shooting down there, the guy'd of got shot.